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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD KRODEL,

Petitioner,

v.

ANDREW J. YOUNG, in his official capacity as Associate Commissioner, Office of Hearings and Appeals, Social Security Administration; DEPARTMENT OF HEALTH AND HUMAN SERVICES; and MARGARET M. HECKLER, in her official capacity as Secretary of the Department of Health and Human Services,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I. Whether *Bush* v. *Lucas*, 462 U.S. 367 (1983), precludes a *Bivens** action based on the First Amendment when the aggrieved federal employee does not have access to the meaningful remedies available to the employee in *Bush*?

II. Whether a federal employee can bring a *Bivens* action when the applicable Civil Service Regulations explicitly exempt his grievance from the administrative/judicial remedial scheme?

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* *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of the case, the following persons were parties to the proceeding below:

1. Robert L. Trachtenberg, former Director of Bureau of Hearings and Appeals (BHA) (sued in his individual capacity)
2. John L. Poore, former Assistant Director of BHA (sued in his individual capacity)
3. Hallet A. Duncan, former Chief of the Management Information System Branch of BHA (sued in his individual capacity)
4. Levi Ogden, former Chief of the Management Analysis Branch of BHA (sued in his individual and official capacities)
5. Mary Pronovost, Chief of the Administrative Branch, Division of Management Analysis (sued in her official and individual capacities).

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Richard Krodel, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on November 20, 1984.

OPINIONS BELOW

The opinion of the court of appeals is reported at 748 F.2d 701 (D.C. Cir. 1984), and appears in the

Appendix at 1a-23a. The Order and Memorandum Opinion of the United States District Court for the District of Columbia granting respondents' motion to dismiss are not reported and appear in the Appendix at 24a-28a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 20, 1984. Petitioner, appearing *pro se,* applied to this Court on February 6, 1985, and obtained on February 14, 1985, an extension of time for filing a petition for a writ of certiorari to April 19, 1985.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

This case involves the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. I.

This case also involves certain sections of the Civil Service Regulations codified in 5 C.F.R. § 771.108(b) (1977), reproduced in the Appendix at 31a, and 5 C.F.R. Part 713 (1977), portions of which are reproduced in the Appendix at 33a.

STATEMENT OF THE CASE

Petitioner, Richard Krodel, has been a management analyst employed by the Office of Hearings and Appeals (OHA)[1] of the Social Security Administration, Department of Health and Human Services, since December 1968. Mr. Krodel is a dedicated public servant who has conscientiously brought evidence of mismanagement, inefficiency, and waste to the attention of his supervisors and others.

Mr. Krodel was hired by BHA at Grade GS-11 in December 1968. In 1971 Mr. Krodel was reclassified as a GS-12 in recognition of his educational background and his previous government experience at the GS-12 level. From 1975 to 1977, Mr. Krodel applied for five different GS-13 positions within BHA but was not selected for any of those promotions. He believes that his nonselection was due to age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 633a. He also maintains that he was not promoted because of his critical comments about agency mismanagement, waste, and inefficiency, in violation of his First and Fifth Amendment rights.

From April of 1976 to December of 1980, Mr. Krodel exhausted his administrative remedies with respect to his age discrimination charges. He had no such remedies available to challenge the infringement of his First Amendment rights.[2] *See infra,* pp. 6-7. On

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[1] Prior to 1979, OHA was designated "Bureau of Hearings and Appeals" (BHA).

[2] 5 C.F.R. Part 713 (1977) provides administrative procedures for handling charges of discrimination from the initial complaint through the appellate stage. 5 C.F.R. § 713.271(b) provides rem-

December 12, 1980, the date of the final decision of the Equal Employment Opportunity Commission on the discrimination claims, Mr. Krodel instituted this lawsuit in the United States District Court for the District of Columbia challenging the government's actions on both age discrimination and First Amendment grounds.

Jurisdiction in the district court was founded upon 28 U.S.C. § 1331, 28 U.S.C. § 1343(4), and 28 U.S.C. § 1346(a)(2). The original named defendants were Andrew J. Young, Associate Commissioner of BHA (sued in his official capacity); Robert L. Trachtenberg, former Director of BHA (sued in his individual capacity); John L. Poore, former Assistant Director of BHA (sued in his individual capacity); Hallet A. Duncan, former Chief of the Management Information System Branch of BHA (sued in his individual capacity); Levi Ogden, former Chief of the Management Analysis Branch of BHA (sued in his official and individual capacities); and Mary Pronovost, Chief of the Administrative Branch, Division of Management Analysis (sued in her official and individual capacities).

On July 9, 1981, the district court dismissed petitioner's First Amendment claims against the individually named defendants. App. at 24a.[3] The district

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edies for nonpromotion based on discrimination. *See* App. at 33a. The Civil Service Regulations provide no means for challenging nonpromotions based on reasons other than discrimination. *See* 5 C.F.R. § 771.108(b)(3) which specifically exempts nonpromotion from the actions covered by the grievance procedure. App. at 31a.

[3] After the dismissal of the First Amendment claims, the age discrimination case proceeded against the Department of Health

court dismissed petitioner's First Amendment claims on the grounds that his speech was not constitutionally protected. App. at 26a-27a. The district court held that "[p]erforming one's job duties is not constitutionally protected speech, and all of plaintiff's allegations are concerned solely with actions taken by plaintiff in the scope of his employment duties." App. at 26a.

On appeal, the D.C. Circuit rejected the district court's First Amendment analysis, but affirmed the dismissal of petitioner's *Bivens* action holding that his *Bivens* claim was precluded by *Bush* v. *Lucas,* 462 U.S. 367 (1983). App. at 20a-21a. The court of appeals considered *Bush* dispositive because Krodel, like the petitioner in *Bush,* "enjoyed meaningful remedies against the government for a free speech related claim arising out of his employment relationship." App. at 21a (footnote omitted). The court further elaborated:

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and Human Services (HHS) and the Secretary of HHS. On February 9, 1983, the district court issued Findings of Fact, Conclusions of Law, and an Order with respect to the discrimination claims. The court noted that Mr. Krodel "was a conscientious and dedicated employee, with a propensity to detect problems in management." ¶ 56. The age discrimination ruling was appealed by respondents and was affirmed by the Court of Appeals for the District of Columbia on November 20, 1984. The age discrimination claims are not involved in this petition for a writ of certiorari.

Petitioner was entitled to pursue both his *Bivens* First Amendment claims and his age discrimination complaint. These causes of action are based on different statutory and constitutional rights and are aimed at different defendants. Petitioner's *Bivens* claim is not an alternative way of pursuing a discrimination claim as was the case in *Brown* v. *General Services Administration,* 425 U.S. 820 (1976). *See infra,* pp. 12-13.

> In particular, Krodel could have processed his complaint inside the agency, *see* 5 C.F.R. § 771.108 (1977), and could have obtained direct judicial review of an adverse agency ruling under the Administrative Procedure Act, 5 U.S.C. § 706.

App. at 21a-22a. Since the court assumed that Krodel had access to the same administrative and judicial remedies as Bush, the court affirmed the dismissal of petitioner's *Bivens* action.

The court of appeals' analysis hinged on its presumption that petitioner could have pursued his First Amendment claim through the agency grievance procedure and obtained judicial review of the agency's determination. The court even cited the Civil Service Regulations at 5 C.F.R. § 771.108 (1977) that cover the grievance procedure. App. at 22a. The court failed to recognize, however, that the Civil Service Regulations do not provide remedies for all categories of employees and grievances. In fact, the very regulations cited by the court as providing Krodel with "meaningful remedies" explicitly exempt his particular grievance from the administrative process. *See* 5 C.F.R. § 771.108(b)(3) (1977). App. at 31a. This subpart states that the grievance mechanism *does not apply* to "[n]onselection for promotion from a group of properly ranked and certified candidates."[4] Consequently, petitioner had no administrative forum for challenging his nonpromotion on First Amendment grounds.

The lower court also faulted petitioner for not presenting his First Amendment claims at the adminis-

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[4] The cited regulations exempt a wide variety of personnel decisions from the grievance procedure. *See* App. at 31a.

trative level in the grievances he did pursue. App. at 22a. Those grievances, however, dealt with his claims of discrimination and were filed pursuant to 5 C.F.R. Part 713. Part 713 of the Civil Service Regulations deals exclusively with discrimination and provides remedies for nonpromotion based only on discrimination. *See* 5 C.F.R. § 713.271(b) (1977). App. at 33a. Thus, it was *not* the appropriate mechanism for challenging the nonpromotions on First Amendment grounds.

REASONS FOR GRANTING THE WRIT

A. THE RESULT IN THIS CASE CONFLICTS WITH *BUSH* v. *LUCAS* AND WITH EARLIER SUPREME COURT CASES PERMITTING *BIVENS* ACTIONS.

There is nothing in the holding or rationale of *Bush* v. *Lucas,* 462 U.S. 367 (1983), or in earlier *Bivens* cases, which forecloses a *Bivens* action to a person who otherwise has no remedy for the violation of constitutional rights.

The viability of a *Bivens* action is determined by the two-part test enunciated in *Bivens,* refined in *Carlson* v. *Green,* 446 U.S. 14 (1980), and applied in *Bush* v. *Lucas:*

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress."

> [citations omitted] . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.

446 U.S. at 18-19 (emphasis in original).

The existence of alternative avenues of relief for the vindication of constitutional rights was the focal point of the analysis in *Bush* v. *Lucas,* 462 U.S. 367 (1983). The Court did not find that Congress had enacted the Civil Service Regulations to provide an exclusive remedy that was as effective as a *Bivens* remedy. Indeed, the Court found just the opposite. Congress had *not* intended the Civil Service Regulations to be an equally effective substitute for a *Bivens* action. The Court concluded, however, that the comprehensive remedial scheme provided by the Civil Service Regulations, which Bush had available to him and, indeed, had pursued, was a "special factor" which justified the refusal to allow the additional *Bivens* remedy.

The availability and the actual use by Bush of effective administrative remedies were key factors underlying the Bush decision. The opinion discusses in great detail both the specific remedies invoked by *Bush,* 462 U.S. at 370-71, and the administrative and judicial remedies available to federal employees whose First Amendment rights are violated by employment decisions. 462 U.S. at 385-88. As the Court stated: "The question is not what remedy the court should provide *for a wrong that would otherwise go unredressed.*" 462 U.S. at 388 (emphasis added). The concurring opinion confirms that "there is nothing in today's deci-

sion to foreclose a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme." 462 U.S. at 391 (Marshall, J., concurring).

The *Bush* case, therefore, does not preclude a *Bivens* action in all situations where a federal employee challenges a personnel action. Rather, *Bush* forecloses a *Bivens* remedy only when the employee involved has access to the range of administrative and judicial remedies that were available to Bush.

Davis v. *Passman,* 442 U.S. 228 (1979), also requires the recognition of a *Bivens* action when the consequences of unconstitutional conduct will not otherwise be remedied. *Davis* extended *Bivens* to a federal employee who claimed that her termination violated the Due Process Clause of the Fifth Amendment. The Court had to decide whether Title VII of the Civil Rights Act of 1964 was an "explicit" congressional declaration that victims of unconstitutional federal employment discrimination could not pursue a *Bivens* action. Because Title VII did not cover federal employees like Davis who were not in the competitive civil service, the court concluded that Title VII did not "foreclose the judicial remedies of those expressly unprotected by the statute." 442 U.S. at 247. A *Bivens* action was therefore permissible.

Thus, a *Bivens* action must also exist when the Civil Service Regulations fail to provide a remedy for a particular category of grievances. Like Davis and Bivens, if Krodel cannot maintain a *Bivens* action, he has no remedy for the violation of his First Amendment rights. *See Bivens,* 403 U.S. at 410 (Har-

lan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing."); *Davis,* 442 U.S. at 245 ("And there are available no other alternative forms of judicial relief.").

Since the result in the instant case is inconsistent with *Bush* v. *Lucas* and *Davis* v. *Passman,* this Court should review the judgment of the Court of Appeals for the District of Columbia and decide whether a *Bivens* action is available to federal employees who do not have meaningful remedies against the United States.

1. When A Federal Employee Has No Civil Service Remedy There Are No "Special Factors" That Justify The Refusal To Permit A *Bivens* Action

The only "special factor" relied upon by this Court in *Bush* v. *Lucas* to deny a *Bivens* remedy was the existence of "comprehensive procedural and substantive provisions giving meaningful remedies against the United States." 462 U.S. at 368. For employees whose First Amendment claims are not "fully cognizable within this system," *id.* at 386, a *Bivens* remedy is necessary for the vindication of their constitutional rights.

This Court should not close the only courthouse door open to federal employees who have no other means of vindicating their constitutional rights. These employees need to know that their First Amendment right to speak out on issues of vital public concern will be protected. Congress recognized the importance of encouraging such disclosures when it passed the Civil Service Reform Act of 1978 and accorded special protection to "whistleblowers":

> Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

S. Rep. No. 95-969, 95th Cong., 2d Session, U.S. Code, Congressional and Administrative News (1978) at 2730. When the statutory system fails to protect these employees, they must have access to the courts.[5]

Speech concerning public affairs is more than self-expression; it is the essence of self-government. *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1965). *See also Mills* v. *Alabama,* 384 U.S. 214, 218-19 (1966); *New York Times* v. *Sullivan,* 376 U.S. 254, 269-70 (1964); *Stromberg* v. *California,* 283 U.S. 359, 369 (1931). Speech on public issues occupies the "highest

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[5] Since the Civil Service Reform Act of 1978 was not in effect at the time of petitioner's nonpromotions, petitioner was not covered by its whistleblower provisions. The mere enactment of the CSRA, however, evidences congressional intent that these public servants have some form of protection.

rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). *Accord Connick* v. *Myers*, 461 U.S. 138, 145 (1983). Public employees who have first-hand knowledge about the workings of government have a unique contribution to make to the public debate. *Pickering* v. *Board of Education*, 391 U.S. 563, 571-72 (1968). In view of the importance of this contribution, some meaningful remedy must be available to secure their constitutional rights. A *Bivens* action is the only source of protection available to federal employees who have no statutory remedy.

Petitioner has *no* remedy for the violation of his First Amendment rights other than a *Bivens* action. His ultimate success in securing a retroactive promotion, backpay, and attorneys' fees for age discrimination is not a substitute for the vindication of his constitutional rights. His age discrimination and First Amendment causes of action are complementary, not mutually exclusive. An analogous situation was presented in *Alexander* v. *Gardner-Denver Company*, 415 U.S. 36 (1974), which involved both an arbitration under a collective-bargaining agreement and a Title VII action. The Court focused on the different rights being vindicated:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And cer-

> tainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

415 U.S. at 49-50. Similarly, petitioner's recovery against the agency for age discrimination does not deprive him of his right to recover compensatory and punitive damages from the officials who violated his constitutional rights.[6]

B. THERE IS A CONFLICT AMONG THE CIRCUITS ON THE PRE-EMPTIVE EFFECT OF THE CIVIL SERVICE REGULATIONS WHEN THE FEDERAL EMPLOYEE DOES NOT HAVE ACCESS TO THE ADMINISTRATIVE/JUDICIAL SCHEME AVAILABLE TO THE EMPLOYEE IN *BUSH*.

This Court should review the lower court's decision in this case to resolve a conflict in the federal circuit courts regarding the pre-emptive effect of the Civil Service Regulations on *Bivens* actions by federal em-

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[6] The compensatory damages available to petitioner in a *Bivens* action would supplement, not duplicate, the damages already received from the agency. Petitioner may be entitled to damages for mental suffering, anxiety, damage to his professional reputation, and out-of-pocket losses other than backpay. *See Bivens*, 403 U.S. at 389-90, 397 ("petitioner is entitled to recover money damages for *any injuries* he has suffered") (emphasis added). Petitioner could also recover punitive damages from the offending officials. *See Carlson* v. *Green*, 446 U.S. at 22 ("Punitive damages are . . . especially appropriate to redress the violation by a Government official of a citizen's constitutional rights.").

Moreover, the value of a *Bivens* action lies not only in the *remedy* available to a particular plaintiff whose constitutional rights have been violated. The deterrent effect provides additional protection against the future deprivation of constitutional rights of others.

ployees. This important constitutional question merits the attention of this Court.

The D.C. Circuit and the Seventh Circuit have held that federal employees who either have no remedy or an inadequate remedy under the Civil Service Regulations can maintain a *Bivens* action in federal court. *Bartel* v. *Federal Aviation Administration,* 725 F.2d 1403 (D.C. Cir. 1984); *Egger* v. *Phillips,* 710 F.2d 292 (7th Cir. 1983) (*en banc*), *cert. denied,* 104 S.Ct. 284 (1983); *Sonntag* v. *Dooley,* 650 F.2d 904 (7th Cir. 1981).

In *Bartel* v. *Federal Aviation Administration,* 725 F.2d 1403 (D.C. Cir. 1984), a former FAA employee brought a *Bivens* action against an FAA official. The court concluded that *Bush* v. *Lucas* barred only those constitutional claims which were "administratively remediable." *Id.* at 1415 n.21. The court stated:

> The administrative scheme which Congress established to protect civil servants' rights preempts a constitutional claim for damages based on conduct remediable under that scheme. *See Bush* v. *Lucas* . . . [citation omitted]. The district court, however, must entertain Bartel's due process claims for damages attributable to wrongful conduct for which that scheme provides no remedy, along with those for injunctive relief.

Id. at 1415 (footnote omitted).

Egger v. *Phillips,* 710 F.2d 292 (7th Cir. 1983) (*en banc*), *cert. denied,* 104 S.Ct. 284 (1983), was an action by a former FBI agent against his superiors for violation of his First Amendment rights. The plaintiff in *Egger* was exempt from the Civil Service Regula-

tions. *Id.* at 297. A *Bivens* action was therefore appropriate:

> While it may be that to the extent Congress has declared certain employment practices unlawful which are also unconstitutional and provide federal employees with adequate remedies for such violations, a *Bivens* action should not be entertained. [citations omitted] the constitutional rights of federal employees in the workplace which are not protected by statute properly form the basis of a *Bivens* action.

Id. at 298.

The plaintiff in *Sonntag* v. *Dooley*, 650 F.2d 904 (7th Cir. 1981), like petitioner Krodel, was a civil service employee whose complaint involved actions that were exempted from the civil service remedial scheme. The court noted that the applicable regulations did not refer to coerced resignations and in fact expressly excluded "a separation action" from the agency's grievance system. *Id.* at 907. The court allowed the *Bivens* action to proceed because the plaintiff actually had no civil service remedy.

The Fourth, Fifth, and Sixth Circuits have not been sympathetic to arguments that the Civil Service Regulations failed to provide adequate, meaningful remedies to a particular aggrieved employee. These Circuits have found that the mere existence of the Civil Service Reform Act of 1978 precludes *Bivens* actions even though some employees are not provided with the elaborate administrative and judicial remedies available to the petitioner in *Bush* v. *Lucas*. *See Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, —— U.S.L.W. —— (U.S. April 15, 1985) (No. 84-

1167);[7] *Braun* v. *United States*, 707 F.2d 922 (6th Cir. 1983); *Broadway* v. *Block*, 694 F.2d 979 (5th Cir. 1982).

In *Pinar* v. *Dole*, *supra*, the Fourth Circuit refused to permit a *Bivens* action brought by an employee whose only remedies were the internal agency grievance procedure and a complaint to the Office of Special Counsel. *Id.* at 905-06. Neither of these alternative remedies would have resulted in any form of judicial review of Pinar's First Amendment claims. Under the CSRA only employees who are victims of "adverse actions" are entitled to formal agency proceedings, an appeal to the Merit Systems Protection Board, and judicial review in the Court of Appeals for the Federal Circuit. *Id.* at 905. The Fourth Circuit dismissed the *Bivens* action even though Pinar was not afforded the extensive remedies afforded to the petitioner in *Bush*. *Id.*

The Fifth Circuit reached the same conclusion in *Broadway* v. *Block*, 694 F.2d 979 (5th Cir. 1982). The Fifth Circuit relied upon its own opinion in *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981), *aff'd* 462 U.S. 367 (1983), and refused to entertain a *Bivens* action brought by a federal employee who was not afforded the administrative and judicial remedies available in *Bush*. *See also Braun* v. *United States*, 707 F.2d 922, 925-26 (6th Cir. 1983).

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[7] A critical difference between the *Pinar* case and the instant case suggests that certiorari should be granted here even though it was denied in *Pinar*. The petitioner in *Pinar* had some administrative remedies available to him under the Civil Servce Reform Act of 1978. Mr. Krodel, who was covered under the regulations which preceded the CSRA, had *no* administrative remedies.

This Court should decide whether a *Bivens* action is available to civil service employees who have no meaningful remedies under the Civil Service Regulations for their constitutional grievances. This Court needs to resolve this important question before the constitutional rights of federal employees are further eroded.[8]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

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[8] Indeed, the district courts are following suit and dismissing *Bivens* actions brought by federal employees. *See e.g., Crumpler* v. *Etter*, 579 F.Supp. 391 (E.D.N.C. 1983); *Francisco* v. *Schmidt*, 575 F.Supp. 1200 (E.D.Wis. 1983); *Watson* v. *U.S. Dept. of Housing and Urban Development*, 576 F.Supp. 580 (N.D.Ill. 1983). In addition, several courts, relying upon *Bush* v. *Lucas*, have refused to entertain non-*Bivens* constitutional claims on the grounds that the Civil Service Reform Act provides the exclusive remedy for all employment related grievances. *Pinar* v. *Dole*, 747 F.2d 899, 909-912 (4th Cir. 1984), *cert. denied*, —— U.S.L.W. ——, (U.S. April 15, 1985) (No. 84-1167); *Hallock* v. *Moses*, 731 F.2d 754 (11th Cir. 1984); *Contra, Williams* v. *IRS*, 745 F.2d 702 (D.C. Cir. 1984). *See also Braun* v. *United States*, 707 F.2d 922 (6th Cir. 1983) (decided before *Bush* v. *Lucas*); *Carter* v. *Kurzejeski*, 706 F.2d 835 (8th Cir. 1983) (decided before *Bush* v. *Lucas*).

Respectfully submitted,

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April 18, 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1426

RICHARD KRODEL, *Appellant*

v.

ANDREW J. YOUNG, in his official capacity as ASSOCIATE COMMISSIONER OFFICE OF HEARINGS AND APPEALS SOCIAL SECURITY ADMINISTRATION, *et al.*

No. 83-1427

RICHARD KRODEL

v.

ANDREW J. YOUNG, in his official capacity as ASSOCIATE COMMISSIONER OFFICE OF HEARINGS AND APPEALS SOCIAL SECURITY ADMINISTRATION, *et al.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES and MARGARET M. HECKLER, SECRETARY in her official capacity, *Appellants*

Appeals from the United States District Court for the District of Columbia

(Civil Action No. 80-03183)

Argued: September 24, 1984
Decided: November 20, 1984
As Amended November 20, 1984

Erik L. Kitchen, Atty., Dept. of Justice, Washington, D.C., with whom Richard K. Willard, Asst. Atty. Gen., Dept. of Justice, Joseph E. diGenova, U.S. Atty., and Robert S. Greenspan, Atty., Dept. of Justice, Washington,

D.C., were on brief, for cross-appellants in No. 83-1427 and appellees in No. 83-1426. Wendy M. Keats, Atty., Dept. of Justice, Washington, D.C., also entered an appearance for cross-appellants in No. 83-1427 and appellees in No. 83-1426.

Charles A. Kubinski, with whom John C. Armor was on the brief, for appellant in No. 83-1426.

Roy J. Bucholtz, Reston, Va., for cross-appellee in No. 83-1427.

Before WRIGHT and WALD, Circuit Judges, and MACKINNON, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

This appeal concerns whether the Bureau of Hearings Appeals ("Bureau" or "BHA") of the Social Security Administration discriminated against the plaintiff, Richard Krodel, on the basis of age and whether Krodel can seek damages from his supervisors for infringing his first amendment rights. In 1976 and 1977, Krodel, then a 60 year old management analyst at the BHA, applied for five separate promotions and was rejected for each. After exhausting his administrative remedies, he brought suit against the Bureau and various BHA supervisors in their official capacity, claiming that the BHA's refusal to promote him violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* He also sued various BHA officials, in their individual and official capacities, for infringing his first and fifth amendment rights. Krodel sought declaratory relief, promotion and back pay under the ADEA; he also sought damages from the individual defendants under his constitutional claim. Although the district court dismissed his constitutional claims, it found that the BHA had violated the ADEA in its refusal to promote Krodel to a Supervisory Management Analyst Position ("Position 1") in February of 1976. On appeal, the Board

challenges the district court's age discrimination holding; Krodel challenges only its dismissal of his first amendment claim.[1] We affirm the district court.

I. THE BACKGROUND

The age discrimination claim hinges on the circumstances surrounding the BHA's selection of Mary Pronovost rather than Krodel to fill Position 1. Krodel was initially hired as a management analyst by the BHA in December of 1968; in July of 1971, he was promoted from level GS-11 to level GS-12. His eight years of experience as a management analyst and his qualifications for Position 1 are not disputed by the government. Pronovost, who was 39 years old at the time of the promotion, joined the BHA in 1973 as a GS-11 staff assistant in the BHA's Division of Facilities after serving as a confidential assistant in another section of the agency. *See Krodel v. Young,* Civ. No. 80-3183, slip op. at 5-6 (February 9, 1983) [hereinafter cited as "ADEA Opinion"]. Pronovost had no management analyst experience whatsoever until three months before her promotion. *See id.* at 6, 32-33.

On July 28, 1975, the BHA announced that it would consider applications for a GS-13 Supervisory Management Analyst position. Applications for the vacancy were solicited from all employees of the Department of Health and Human Services, for a period of approximately three weeks. *See id.* at 4. Krodel applied for this position, but Pronovost did not. In November of 1975, defendant Levi Ogden, the head of the relevant BHA section, decided to cancel the vacancy announcement because in his judgment, none of the

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[1] Although Krodel originally appealed the district court's ruling on the availability of attorney's fees for representation in prior administrative proceedings, he has now conceded that the issue is not properly before the court at this time. *See* Brief for Appellee/Cross-Appellant at 35. See 576 F.Supp. 390.

applicants demonstrated the requisite experience in management analysis. *See id.*

While the initial applications for Position 1 were pending, Pronovost attended a three-day training course in management for government administrators. *See id.* at 6. In December, Ogden requested that Pronovost be reassigned to a GS-12 Management Analyst position in the BHA's central office; effective December 7, 1975, she was reassigned to that position without competition. *Id.* On February 11, 1976, the vacancy announcement for Position 1 was reposted. The second announcement, however, solicited only employees of the central office and remained open only until February 18th. At trial, Ogden could give no explanation for reducing the time period and the area of consideration for the second vacancy announcement. *See id.* at 7. This time, both Krodel and Pronovost applied for the promotion to Position 1.

The BHA's personnel office determined that seven applicants, including Krodel and Pronovost, met the minimum qualifications for Position 1 and referred those names to a rating panel comprised of defendant Hallet Duncan and another BHA supervisor. The rating panel submitted to Ogden a "best qualified list" consisting of Krodel, Pronovost and another BHA employee, then 41 years old. After reviewing the best qualified list, Ogden wrote a memorandum recommending the selection of Pronovost. *See id.* at 13. Ogden stated that his recommendation was "based on personal observation and frequent professional contract with [Pronovost]" in her position in the Division of Facilities and "her outstanding performance of duties as a Management Analyst since December 1975." Memorandum to the Director of BHA (March 17, 1976), Joint Appendix ("J.A.") at 211a. Consistent with standard BHA practice, Ogden's recommendation was approved by defendants Robert Trachtenberg, Director of the BHA, and John Poore, Assistant Director of the BHA.

After exhausting his administrative remedies, Krodel sued BHA officials for age discrimination in connection with the Board's failure to promote him to Position 1 and to four other positions at the BHA. He also alleged that the BHA had refused to promote him in retaliation for his critical comments about "agency mismanagement, misuse of funds and human ignorance and inefficiency," Plaintiff's First Amended Complaint ¶ 53, J.A. at 34a, thereby violating his first amendment rights. Finally he claimed that the BHA's actions deprived him of a "vested property interest" in "promotion and managerial status." *Id.* He sought promotion and back pay from defendant Andrew Young, the present director of the BHA, and *Bivens*-type[2] damages from the other individual defendants.

Pursuant to the Board's motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court dismissed Krodel's constitutional claims at the onset of the litigation. *See Krodel v. Young*, Civ. No. 80-3183, mem. op. at 2-3 (July 9, 1983) [hereinafter cited as *"Constitutional Opinion"*]. The court ruled that Krodel could not establish that his alleged criticisms of the BHA constituted speech protected by the first amendment. *See id.* at 2-3.[3]

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[2] *See Bivens v. Six Unknown Named Fed. Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (allowing the recovery of damages for fourth amendment violations by individual federal officials acting in their official capacity); *see also Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (same under the eighth amendment); *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (fifth amendment); *Dellums v. Powell*, 566 F.2d 167 (D.C.Cir. 1977) (first amendment), *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978).

[3] The district court also interpreted Krodel's complaint to allege that the BHA had retaliated against him for filing prior age discrimination complaints. *See Constitutional Opinion* at 2-3. The court concluded that the ADEA provided him with an adequate

After a six-day bench trial on the age discrimination claim, the district court concluded that the BHA violated the ADEA in its decision not to promote Krodel to Position 1. Applying the tripartite evidentiary scheme developed in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the district court ruled that the BHA's explanation of the promotion decision was unworthy of credence and a pretext for discrimination. *See ADEA Opinion* at 29. The district court also found indicia of age discrimination in the Board's failure to follow its own promotion policies, statistical evidence, and largely uncontested anecdotal evidence concerning BHA practices. *See id.* at 33-35. Viewing the evidence as a whole, the district court concluded that "the true reason underlying [the] promotion [to position 1] was age discrimination." *Id.* at 36.

We now affirm the district court's ADEA ruling and its dismissal of Krodel's first amendment action. Because we conclude that Krodel's *Bivens* action is barred by the Supreme Court's recent decision in *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), however, we need not determine whether his alleged criticisms of the BHA constitute protected speech under the first amendment.

II. THE AGE DISCRIMINATION CLAIM

The ADEA requires federal employment decisions to "be made free from any discrimination based on age." 29 U.S.C. § 633a(a); *cf. id.* § 623 (prohibiting private em-

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and exclusive remedy for all such claims. *See id.* at 3. Finally, the district court held that Krodel had no property interest in being promoted, *id.* at 3 n. 1, and that the ADEA constituted an exclusive remedy for any other claims that the BHA denied him due process in its promotion decisions. *Id.* at 3. Krodel does not challenge these rulings on appeal.

ployers from taking adverse action against employees "because of" their age). The BHA argues that the district court misapprehended the thrust of the ADEA and erroneously employed the age discrimination statute to second-guess government employment decisions.

> The district court's conclusion of law reflect its belief that plaintiff, and not Ms. Pronovost, was a more appropriate person to fill Position 1. However, the ADEA is not intended as a vehicle for general review of business decisions, and does not provide a remedy for non-selection based on factors, permissible or impermissible, other than age.

Brief for Appellants/Cross-Appellees at 11. We believe, however, that the relevant ADEA issues on appeal are substantially narrower. They concern whether the district court required from Krodel sufficient proof to create a reasonable inference that the Bureau was motivated by impermissible age discrimination and whether the district court's factual findings supporting the ultimate issue of age discrimination were clearly erroneous. We conclude that the district court applied the correct legal standard, imposed the appropriate burden of proof on the plaintiff, and did not make any clearly erroneous findings of fact.

A. Procedure and Proof Under the ADEA

Courts have generally applied the tripartite evidentiary scheme developed in the context of Title VII litigation to suits brought under the ADEA. *See Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 342-43 (D.C.Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 488, 78 L.Ed.2d 683 (1983); *Cuddy v. Carmen*, 694 F.2d 853, 856-57 (D.C.Cir. 1982); *Johnson v. Lehman*, 679 F.2d 918, 922 (D.C.Cir. 1982). According to the guidelines originally articulated in *McDonnell Douglas*, an individual plaintiff claiming disparate treatment must first make out a *prima facie* case—

i.e., must demonstrate sufficient facts to create a reasonable inference that race, sex or age was a factor in the employment decision at issue. Once a *prima facie* case has been established, the employer bears a minimal burden of "producing evidence" tending to show that the plaintiff was denied employment or promotion for a legitimate nondiscriminatory reason. If the employer does so—and if his evidence is credible—the plaintiff must show by a preponderance of the evidence that the employer's asserted legitimate reason is a "pretext" for discrimination. *See McDonnell Douglas*, 411 U.S. at 800-02, 93 S.Ct. at 1823-24; *Burdine*, 450 U.S. at 252-53, 101 S.Ct. at 1093-94; *Coburn*, 711 F.2d at 342; *see generally Segar v. Smith*, 738 F.2d 1249, 1297-98 (D.C.Cir.1984) (Edwards, J., concurring). In disparate treatment cases, "the ultimate burden of persuading the trier of fact that the defendant discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093. Moreover, the Supreme Court has recently admonished that the relevant issue on appeal of a fully litigated discrimination suit is ordinarily whether the plaintiff has met this "ultimate" burden, not whether one of the intermediate burdens has been met. *See United Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

In an ADEA case, the plaintiff's ultimate burden is to prove that age was "a determining factor" in the challenged employment decision. *Coburn*, 711 F.2d at 342; *Cuddy*, 694 F.2d at 857. The plaintiff must prove that "age made a difference in the employer's decision," *Cuddy*, 694 F.2d at 857-58, in the sense that, "but for" the discriminatory motive, the employee would have been hired, promoted or retained. *See id.* at 858 & n. 23. The question of discriminatory intent, moreover, is a finding of fact subject to the "clearly erroneous" standard of review established in Rule 52(a) of the Federal Rules of Civil Procedure. *See Pullman-Standard, Inc. v. Swint*, 456 U.S. 273, 288, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *Aikens*, 103 S.Ct. at 1485. The

district court's ADEA ruling in this case can thus only be overturned if the court committed legal error or if we are "left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *see Coburn*, 711 F.2d at 345.

B. The District Court's Application of the ADEA Standard

Neither party disputes the district court's ruling concerning the first two "stages" of the plaintiff's case. The district court held that Krodel established a *prima facie* case by demonstrating (1) that he belongs to the statutorily protected age group (40-70 years), (2) that he was, by the government's own admission, qualified for the position at issue, (3) that he was not promoted and (4) that the employee eventually promoted was outside the protected class. *See ADEA Opinion* at 26-28. This ruling comports with the governing law in this circuit, *see Coburn*, 711 F.2d at 342; *Cuddy*, 694 at 850-57, and it creates an inference that, absent *any* evidence to the contrary, the BHA acted for discriminatory reasons. The district court also held that the defendant articulated a legitimate, nondiscriminatory reason for its action by "stating simply that the agency selected the better candidate." *ADEA Opinion* at 28.

At this point, the parties were brought to the "ultimate question" of motive: the plaintiff was required to demonstrate that the defendant's proffered reason was merely a pretext for age discrimination. As the district court correctly stated, Krodel had to "prove by a preponderance of the evidence that age made a difference in the employer's decision not to hire him." *ADEA Opinion* at 27. This appeal thus hinges on the elements required to prove that the Board's explanation of the challenged promotion was a pretext for discrimination. The Board argues that Krodel must discredit its explanation *and* provide particularized evidence of actual age discrimination in the specific employ-

ment decision at issue in order to meet this ultimate burden. Brief for Appellants/Cross-Appellees at 11. The district court, by contrast, concluded that Krodel could prevail by demonstrating that the Bureau's explanation was a sham and by offering additional circumstantial evidence of age discrimination in the BHA. *See ADEA Opinion* at 35-36. We conclude that the district court's approach was entirely correct.

In *Burdine,* the Court indicated that a discrimination plaintiff could satisfy his or her burden of proof in one of two independent ways:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this *either* directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256, 101 S.Ct. 1095 (emphasis supplied). In *Aikens,* moreover, the court clearly indicated that a discrimination plaintiff need not submit direct evidence of discriminatory intent. *See Aikens,* 103 S.Ct. at 1481 n. 3. Noting that "trial courts should not treat discrimination differently from other ultimate questions of fact," *id.* at 1482, the Court stated that "the district court must decide which party's explanation it believes, *id.,* on the basis of all the evidence before it. *See Cooper v. Federal Reserve Bank of Richmond,* —— U.S. ——, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); *see also Int'l B'hd of Teamsters v. United States,* 431 U.S. 324, 358 n. 44, 97 S.Ct. 1843, 1866 n. 44, 52 L.Ed.2d 396 (1977) ("Elimination of [the defendant's] reasons for the refusal to hire is sufficient, absent

any other explanation, to create an inference that the decision was a discriminatory one.'')[4]

This circuit, in turn, has not required an ADEA plaintiff to offer particularized evidence of intentional discrimination in order to prove pretext. *See Coburn*, 711 F.2d at 344; *Cuddy*, 694 F.2d at 859; *cf. Segar*, 738 F.2d at 1302 (Edwards, J., concurring). In *Cuddy*, the court indicated that age discrimination plaintiffs almost necessarily have to rely on indirect evidence, including discrepancies in the defendant's proffered explanation, to prove that an employer was motivated by illegitimate concerns.

> [W]hen weighing the evidence the District Court must keep in mind the difficulties plaintiffs face in proving ADEA violations. Employees and applicants for employment have great informational disadvantages: they cannot reach into the minds of decisionmakers, and

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[4] In his *Aikens* concurrence, Justice Blackmun expressly reaffirmed a discrimination plaintiff's ability to meet his or her ultimate burden by discrediting the employer's legitimate, non-discriminatory explanation.

> Th[e] ultimate burden may be met in one of two ways. First, as the Court notes, a plaintiff may persuade the court that the employment decision more likely than not was motivated by a discriminatory reason. . . . In addition, however, this burden is also carried if the plaintiff shows "that the employer's proffered explanation is unworthy of credence." While the Court is correct that the ultimate determination of factual liability in discrimination cases should be no different from that in other types of civil suits, the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, non-discriminatory reason given by the employer is in fact not the true reason for the employment decision.

Aikens, 103 S.Ct. at 1483 (Blackmun, J., concurring) (citations omitted).

> therefore they usually can gather only circumstantial evidence of discriminatory motives. Hence, the trier of fact should take special care to require of plaintiff only that he present sufficient evidence to allow a reasonable person to draw from it the inference of the fact to be proved. Plaintiff-appellant should only have to show that age was a determining factor, as earlier defined, in the government's decision to hire someone else by a preponderance of the evidence.

Cuddy, 694 F.2d at 859 (citations and footnotes omitted). *See also Mistretta v. Sandia Corp.*, 639 F.2d 588, 597 (10th Cir. 1980). At the very least, then, *Burdine*, *Aikens* and *Cuddy* make clear that an ADEA plaintiff who has established a prima facie case and has effectively discredited the employer's proffered justification need not, in all cases, submit additional evidence concerning the particular employment decision at issue in order to demonstrate that age was a determining factor in the employer's action.[5]

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[5] In *Burdine*, the court also suggested that a plaintiff need not always come forward with any additional evidence after discrediting the defendant's proffered justifications:

> A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Burdine, 450 U.S. at 255 n. 10, 101 S.Ct. at 1095 n. 10; *see Segar*, 738 F.2d at 1269. In this case, of course, Krodel offered additional evidence of age discrimination within the BHA. *See infra* pp. 708-711. We are thus not squarely presented with the question of

In effect, the BHA argues that the plaintiff only proved, and the district court merely concluded, that the government made a poor promotion decision—a conclusion too weak to support a finding of pretext. Yet the district court clearly relied on more than a simple challenge to the soundness of the defendant's employment decision. Instead, it found that the government's version of the selection process was a virtual sham and inferred from this conclusion and the additional circumstantial evidence before it that age was a determining factor in the decision not to promote Krodel. We conclude, then, that the district court applied the correct legal standard to Krodel's age discrimination claim. The ADEA ruling can only be overturned if the district court committed legal error in *considering* the plaintiff's circumstantial evidence of age discrimination or if it made "clearly erroneous" factual findings. *See Segar*, 738 F.2d at 1272-73.

C. The District Court's Factual Findings

Although the district court made numerous findings of fact, they can be grouped into 4 broad categories, each of which is challenged by the defendant: (1) that the Board failed to offer any credible explanation of why Pronovost, the eventual selectee for Position 1, was "better qualified" than the plaintiff, (2) that various statistics supported the charge of age discrimination, (3) that a BHA administrator had expressed a general preference for younger employees, and (4) that, as attested to by several witnesses, the BHA generally favored younger employees. We conclude that the district court properly considered this evidence and that its eventual conclusions of fact were not clearly erroneous.

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whether a discrimination plaintiff can prevail solely on the strength of his or her *prima facie* case coupled with an effective rebuttal of the employer's explanation.

1. *The Bureau explanation.* The district court found that Pronovost had been pre-selected for Position 1 in view of the fact that the original vacancy announcement was cancelled and that the subsequent vacancy announcement appeared to be tailored for Pronovost who lacked substantial supervisory experience. *See ADEA Opinion* at 32-34. The court also found that Pronovost was erroneously overrated by the screening committee—a rating that placed her on the best qualified list—and that Ogden's testimony as to her qualifications was not credible. *See id.* at 33-34. In effect, the BHA suggests that we should undertake a *de novo* review of these findings. It argues that the district court erroneously minimized Krodel's shortcomings as an employee and that the trial judge should have respected Ogden's "good-faith evaluation of the factors that led him to believe that Pronovost would make a preferable supervisor." Brief for Appellants/Cross-Appellees at 17. The district court, however, carefully examined Pronovost's qualifications and Ogden's stated reasons for preferring Pronovost to Krodel and concluded that Ogden's explanation was unworthy of belief. Ogden was the only witness at trial who testified as to Pronovost's qualifications—"a critical witness," as the court put it. *ADEA Opinion* at 31. Yet he could not offer any specific reason as to why he recommended her on either direct or cross-examination; indeed he repeatedly stated that he did not recall Pronovost's work. The district court also noted that Ogden had testified under oath at least three times before the trial (in administrative hearings in 1978 and 1980, and in a deposition in 1982) and that on each prior occasion he admitted that he could not recall Pronovost's actual performance. *See id.* at 31-32. "[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed.R.Civ.P. 52(a), and we cannot overturn the district court's reading of Ogden on the cold record before us. Similarly, the district court specifically noted the plaintiff's possible deficiencies as an employee, *see ADEA Opinion*

at 16-17, and there is no indication that the court "minimized" these considerations in judging Ogden's credibility.

The BHA also persistently asserts that the district court's conclusion that the government did not adhere to its own procedures in selecting Pronovost over the plaintiff "is simply insufficient in and of itself to support a finding of age discrimination." Brief for Appellants/Cross-Appellees at 16-17, n. 4. Regardless of whether this position is correct, *see supra* pp. 706-08, the court's finding that Pronovost was preselected for Position 1 is undeniably relevant to the question of discriminatory intent. "The fact that a court may think that the employer misjudged the qualifications does not in itself expose him to . . . liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Burdine*, 450 U.S. at 259, 101 S.Ct. at 1097, *see also Cuddy*, 694 F.2d at 859; *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n. 6 (1st Cir.1979). In this case, of course, the district court did not conclude that the government made a good-faith "mistake" in promoting Provonost over Krodel; instead, it relied on the improper procedures and uncreditable testimony concerning Pronovost's promotion to conclude that the government's explanation was unworthy of belief. We cannot say that the district court's finding that Pronovost was preselected for Position 1 was clearly erroneous.

2. *The district court's use of statistics.* The trial judge considered statistical evidence that the number of ADEA complaints filed against the Management Analysis Branch of the BHA significantly increased between 1974 and 1977, that the percentage of employees over 40 in that Branch decreased after 1974, and that the average age in that office was 37.5. The government offers an explanation other than age discrimination that might account for each "statistical finding." More importantly, however, the BHA argues that Krodel's statistics cannot be probative of age discrimina-

tion because they were not adequately compared to the relevant labor pool.

The importance of statistical evidence in Title VII and ADEA claims varies considerably according to the type of discrimination alleged. Statistical evidence is crucial in disparate impact cases, where plaintiffs need not prove discriminatory intent but must show that specific employment practices "select applicants . . . in a racial pattern significantly different from that of the pool of applicants." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *see Segar*, 738 F.2d at 1274. In actions involving claims of *classwide* disparate treatment—so-called pattern or practice cases—plaintiffs also typically rely on statistical evidence to show that comparably qualified members of the protected group are treated differently across the board. Courts typically infer a discriminatory motive from this difference in treatment. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 & n. 46, 97 S.Ct. 1843, 1867 & n. 46, 52 L.Ed.2d 396 (1977). In these two contexts—where liability depends on a challenge to systemic employment practices—courts have required finely tuned statistical evidence, normally demanding a comparison of the employer's relevant workforce with the qualified populations in the relevant labor market. *See Hazelwood School District v. United States*, 433 U.S. 299, 308 n. 13, 97 S.Ct. 2736, 2741 n. 13, 53 L.Ed.2d 768 (1977); *Segar*, 738 F.2d at 1274-75; *Davis v. Califano*, 613 F.2d 957, 963 (D.C.Cir.1979).

In *individual* disparate treatment cases, however, statistical evidence is less significant because the ultimate issue is whether the *particular* plaintiff was the victim of an illegitimately motivated employment decision. Yet statistical evidence is certainly *relevant* to a showing of pretext in disparate treatment actions. *See McDonnell Douglas*, 411 U.S. at 804-05, 93 S.Ct. at 1825-26. Although the Supreme Court has not directly addressed the precision with which

an individual disparate treatment plaintiff must present statistical evidence, it has pointed out that such evidence is admissible and may be helpful, though ordinarily not dispositive. *See Furnco Constr. Co. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). The Court has likewise emphasized that statistics "come in infinite variety and, like other kinds of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340, 97 S.Ct. at 1856.

In the case before us, there is no indication that the district court thought the challenged statistics dispositive of, or even essential to, Krodel's claim. The trial judge explicitly considered the defendant's challenges to the meaningfulness of the statistics and concluded that they had at least some relevance to its ultimate judgment concerning discriminatory intent. "Although the statistics presented by the plaintiff are broad and tentative," the court concluded, "the simple percentage comparisons are not so simplistic as to lack meaning." *ADEA Opinion* at 39 n. 3. In this context, a trial judge should be allowed to consider a disparate treatment plaintiff's statistics and to judge for herself their meaningfulness to the question of discriminatory intent. *Cf. Trout v. Lehman*, 702 F.2d 1094, 1101 (D.C. Cir.1983) ("Deficiencies in the data base may, of course, detract from the value of [statistical] evidence, but ordinarily would not obliterate its evidentiary value."), *vacated on other grounds*, —— U.S. ——, 104 S.Ct. 1404, 79 L.Ed.2d 732 (1984). We thus affirm the district court's treatment of Krodel's statistics.

3. *Duncan's age-related remark.* The district court also credited a witness' testimony that Duncan, a Bureau supervisor and a member of the rating panel for Position 1, expressed a general preference for younger employees in the BHA. *See ADEA Opinion* at 34. The court further noted that Duncan neither admitted nor denied that he had made such a statement. The government argues that this finding

of fact was "clearly erroneous" that Duncan in fact denied making any such statement. *See* Brief for Appellant/Cross Appellees at 14-15. As we read the record, however, Duncan did not deny making this remark; at best he testified that he did not recall the conversation in question, but he surely left open the possibility he could have made the statement or conveyed such an impression. *See* Trial Transcript at 663, J.A. at 125a. Age-related comments are certainly probative of discriminatory motive, *see Mistretta v. Sandia Corp.*, 639 F.2d 588, 600 (10th Cir.1980), and the district court's conclusion that Duncan made such a remark amounts to a credibility judgment entitled to substantial deference.

4. *Other anecdotal evidence.* Finally, the government attacks the court's consideration of other anecdotal testimony concerning age discrimination within the BHA. Anecdotal evidence of discrimination plays an important role in discrimination suits by bringing cold numbers to life. *See Hazelwood,* 433 U.S. at 308-09, 97 S.Ct. at 2741-42. The trial judge, in turn, is normally responsible for determining how much weight such evidence should be accorded. *Cf. Segar,* 738 F.2d at 1278 ("All evidence that a plaintiff presents can contribute to [an inference of discrimination], and should . . . be considered as cumulative."). Here, the defendants had ample opportunity to challenge the anecdotal evidence at trial, and the district court merely gave the evidence some, not dispositive, weight. The BHA cannot renew its challenges to this evidence on appeal by arguing that such testimony should be given "no weight whatsoever." *See Scofield v. Bolts & Bolts Retail Stores,* 21 F.E.P. 1478, 1480 (S.D.N.Y.1979) (finding age-related remarks highly probative of discriminatory intent).

D. Conclusion

The BHA argues that, even if these discrete factual findings were not clearly erroneous or based on legal error, the evidence as a whole cannot support the district court's

finding of discriminatory intent. *See* Brief for Appellants/Cross-Appellees at 18; Reply Brief at 4-5. In effect, this position suggests that an appellate court can aggressively review the ultimate finding of discrimination in an ADEA claim free from the constraints of Rule 52(a), even though it is bound by the clearly erroneous rule in reviewing subsidiary factual findings. The Supreme Court has expressly rejected this distinction between "ultimate" and "subsidiary" facts for the purposes of reviewing district court findings of discriminatory intent. *See Pullman-Standard, Inc. v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.E.2d 66 (1982). In *Pullman-Standard*, the Court held that "under [the seniority provision of Title VII] discriminatory intent is a finding of fact to be made by the trial court." *Id.* at 288, 102 S.Ct. at 1789. Although the Court indicated that a more aggressive review might be appropriate in other mixed questions of law and fact, *see id.* at 286-87 n. 16, 102 S.Ct. at 1788-89 n. 16, it rather clearly indicated that a finding of discriminatory intent can be overturned on appeal only if clearly erroneous.

Here, the BHA sought to rebut the plaintiff's *prima facie* case by arguing that Pronovost was better qualified for Position 1 than plaintiff. On all the evidence before it, including testimony concerning suspicious procedures, the critical testimony of the recommending government official, statistical evidence, and anecdotal evidence, the district court concluded that the proffered explanation was a sham and that age was a determining factor in the government's refusal to promote the plaintiff. In the absence of legal error or clearly erroneous factual findings, the district court's choice of "which party's explanation of the employer's motivation it believes," *Aikens*, 103 S.Ct. at 1482, must be affirmed.

III. THE FIRST AMENDMENT CLAIM

Krodel also alleged in his complaint that the BHA refused to promote him in retaliation for his persistent criticism of the Bureau's management. As a management analyst, Krodel was responsible for analyzing and criticizing the effectiveness of the BHA's practices and procedures. *See Constitutional Opinion* at 2. The district court concluded that Krodel could not state a claim for damages under the first amendment because "[p]erforming one's job duties is not constitutionally protected speech." *Id.* We agree that Krodel's *Bivens* action under the first amendment should be dismissed, but not for the reason relied upon by the district court. Instead, we conclude that *Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), precludes Krodel from seeking first amendment damages from his superiors in a dispute arising out of his employment relationship.

In *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), a case decided after the district court's dismissal of Krodel's first amendment claim, the Court held that the constitutional status of public employee speech turns on whether the speech relates to "a matter of public concern." *Id.* at 147, 103 S.Ct. at 1690. Measured against this standard, Krodel's criticisms of BHA management could *conceivably* state a claim under the first amendment irrespective of his responsibilities as a management analyst. *See, e.g., McKinley v. City of Eloy,* 705 F.2d 1110, 1114 (9th Cir.1983). In any event, the *Connick* Court clearly indicated that the relevant first amendment inquiry must be "determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-48, 103 S.Ct. at 1690-91; *see also Murray v. Gardner,* 741 F.2d 434, 438 (D.C.Cir. 1984) (noting that a public employee's first amendment claim "depends on careful scrutiny of the facts surrounding the employee's declaration"). Because the constitutional status of public

employee speech turns on this fact-specific, case-by-case consideration of the relevant context, it would normally be quite difficult to resolve an employee's *Bivens* claim on a Rule 12(b)(6) motion to dismiss. For the purpose of such a motion, the factual allegations of the complaint must be taken as true, and any ambiguity concerning the sufficiency of claim resolved in favor of the pleader. *See, e.g., Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Sinclair v. Kleindienst,* 711 F.2d 291, 293 (D.C.Cir. 1983). Krodel, in turn, expressly alleges that the BHA retaliated against him for speaking out on matters of public concern. *See* Plaintiff's First Amended Complaint ¶ 53, J.A. at 34a.

We need not, however, determine whether Krodel has alleged constitutionally protected speech because we conclude that his *Bivens* claim is precluded by *Bush*. In *Bush*, the Court declined to allow a career employee of the competitive civil service to bring a damage action under the first amendment. *See id.* at 2406. In particular, the Court held that

> Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we concluded that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy.

Id. As a member of the pre-Civil Service Reform Act competitive civil service, Krodel enjoyed meaningful remedies against the government for a free speech related claim arising out of his employment relationship.* In particular,

---

* Both Krodel and the plaintiff in *Bush* were covered by the collection of statutes, executive orders and regulations that preceded the Civil Service Reform Act (CSRA) of 1978, Pub.L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of

Krodel could have processed his complaint inside the agency, *see* 5 C.F.R. § 771.108 (1977), and could have obtained direct judicial review of an adverse agency ruling under the Administrative Procedure Act, 5 U.S.C. § 706. *See Carducci v. Regan*, 714 F.2d 171, 174 n. 1 (D.C.Cir. 1982) (collecting cases); *see also Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979). In fact, however, Krodel never raised his first amendment related complaints in any of the five separate grievances he filed at the agency level. His free speech claim is decidedly an afterthought and subsidiary to the age discrimination claim upon which he has prevailed. *Cf. Constitutional Opinion* at 2-3.

Krodel himself concedes that "[i]f *Bush* were the principal relevant case this Court should be inclined to affirm the district court . . . on the grounds that there was a 'comprehensive' scheme of civil service remedies both available and used." Brief for the Appellees/Cross Appellants at 25. Krodel argues, however, that *Bush* can be distinguished because his criticisms concerned public waste and were therefore in the public interest. This argument was squarely rejected in *Bush* itself. *See Bush*, 103 S.Ct. at 2417. Because Krodel enjoyed a comprehensive statutory forum for his free speech claims, we conclude that he cannot bring a *Bivens* action against his supervisors for infringing his first amendment rights in a dispute arising out of his employment relationship.

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5 U.S.C.). *See Bush*, 103 S.Ct. at 2416. As a member of the pre-CSRA *competitive* civil service, Krodel was thus in a different position than the appellants in *Borrell v. United States International Communications Agency*, 682 F.2d 981 (D.C.1982), and *Williams v. IRS*, 745 F.2d 702 (D.C.Cir.1984), who were governed by the CSRA. Those employees could not seek direct judicial review of a prohibited personnel practice not amounting to an adverse action; instead, their only statutory remedy was an essentially discretionary and unreviewable petition to the Office of the Special Counsel. *See Williams*, at 704-705.

IV. CONCLUSION

For the reasons discussed above, we affirm the district court's ruling that the BHA violated the ADEA and its dismissal of Krodel's *Bivens* action.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3183

RICHARD KRODEL,
Plaintiff,

v.

ANDREW T. YOUNG, *et al.*,
Defendants.

[Filed July 9, 1981 James E. Davey, Clerk]

ORDER

This matter is before the court on defendant's motion to dismiss and plaintiff's opposition thereto. Upon consideration of the entire record, and having heard oral argument, it is, by the court, this 9th day of July, 1981,

ORDERED that plaintiff's claims under the First and Fifth Amendments are hereby dismissed; and it is further

ORDERED that plaintiff is granted leave to amend his complaint by naming a proper party defendant; and it is further

ORDERED that a status call be held in this matter on August 11, 1981 at 9:30 a.m.

/s/ THOMAS A. FLANNERY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3183

RICHARD KRODEL,
Plaintiff,

v.

ANDREW T. YOUNG, *et al.*,
Defendants.

[Filed July 9 - 1981 James E. Davey, Clerk]

MEMORANDUM

I. Background

Plaintiff is a 64 year old management analyst employed in the Office of Hearing Appeals (OHA) of the Social Security Administration. He claims he has been denied promotions on the basis of age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et. seq.*, and that his First and Fifth Amendment rights have been violated. He alleges that he was discriminated against by OHA officials on four occasions in 1976 and 1977 when he was denied promotions. Following each denial he filed an administrative complaint, and those matters are now pending before the Equal Employment Opportunity Commission. He also filed a fifth complaint alleging retaliation by various agency officials. By this action plaintiff seeks declaratory relief, back pay, and promotion under ADEA. He also seeks compensatory and punitive damages from the individual defendants alleged to have violated his constitutional rights.

Defendants moved to dismiss this action pursuant to Rule 12(b), Fed. R. Civ. P. on three grounds. Plaintiff then sought leave to file an amended complaint. The court granted him leave, and the defendants have now filed a supplemental memorandum in support of their motion to dismiss. They now seek dismissal of all causes of action based on the First and Fifth Amendments, in part because they argue that ADEA provides the exclusive remedy for age discrimination, and in part because plaintiff has failed to state a claim upon which relief can be granted. Defendants also seek dismissal of all claims against all defendants in their official capacities on the grounds that they are not proper party defendants under ADEA.

II. First Amendment Claims

Plaintiff contends that he is committed to the principles of correcting management inefficiency and waste and that he has constantly brought inefficiency and waste to the attention of his supervisors. He alleges that as a result of this, defendants have refused to accord him full due process in violation of his Fifth Amendment rights. The key question presented here is whether the speech involved is constitutionally protected speech, and as plaintiff admits, he has the burden of establishing that it is. *See Mount Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977).

As defendants point out, plaintiff's job is "[to analyze] complex processes or functions affecting the organizational structures and management policies, practices, methods and procedures for the purpose of improving the efficiency and effectiveness of [OHA] nationwide operations." Job Description GS-343-12, Pl. Ex. A. Performing one's job duties is not constitutionally protected speech, and all of plaintiff's allegations are concerned solely with actions taken by plaintiff in the scope of his employment duties. The cases cited by plaintiff all involve causes of action where

the protected speech was not expressed as part of the performance of plaintiff's job duties. *See, e.g., Givhan v. Western Line Consolidated School,* 439 U.S. 410 (1979); *Pickering v. Board of Education,* 391 U.S. 563 (1968); *Harper v. Blumenthal,* 478 F. Supp. 176 (D.D.C. 1979). A contrary holding would turn nearly every personnel action into a constitutional issue. Moreover, to the extent that plaintiff is claiming that his First Amendment rights were curtailed in retaliation for his filing discrimination claims, these are clearly covered by ADEA and plaintiff has an adequate, and exclusive remedy under the statute. *Cf. Neely v. Blumenthal,* 458 F. Supp. 945 (D.D.C. 1978) (Dismissing plaintiff's First Amendment claims where they challenged conduct prohibited by Title VII).

III. Fifth Amendment Claims

Similarly, plaintiff's Fifth Amendment claims are inextricably linked to his age discrimination claims. He alleges that "The aforesaid acts, policies, and practices by defendants are designed to deny plaintiff due process and full access to all of the benefits of his employment in which he has a vested property interest, such as promotion and managerial status." First Amended Complaint, ¶ 55. These are the very claims intended to be redressed by ADEA. The only case which appears to have directly confronted this issue is *Christie v. Marston,* 451 F. Supp. 1142 (N.D. Ill. 1978). There the court held that all causes of action based on the Fifth Amendment for events occurring after May 1, 1974, the effective date of ADEA, must be dismissed because ADEA is an exclusive remedy. Because plaintiff complains of allegedly discriminatory denials of promotions in 1976 and 1977, his Fifth Amendment claims must be dismissed.[1]

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[1] In addition, while plaintiff contends he has a property interest in his job, he clearly has no property interest in being promoted,

IV. Failure to Name a Proper Party Defendant

The only proper party defendants under § 15 of ADEA are the employer agency, the head of the employer agency in his official capacity, or the United States. *Carter v. Marshall,* 457 F. Supp. 38, 41 (D.D.C. 1978). Defendants seek dismissal on the grounds that neither the Department of Health and Human Services, the Secretary of HHS, or the United States are named as party defendants. Rather than dismissing this action, the court will allow plaintiff to amend his complaint by naming a proper party defendant. *See* Rule 15(a), Fed. R. Civ. P.

An appropriate Order accompanies this Memorandum.

/s/ THOMAS A. FLANNERY
United States District Judge

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for that is a mere "expectation" rather than a "legitimate entitlement." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Since he complains about failure to receive *promotions* rather than being fired, he has not properly invoked the Fifth Amendment.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action No. 80-03183

No. 83-1426

RICHARD KRODEL, *Appellant*

v.

ANDREW J. YOUNG, in his official capacity as ASSOCIATE COMMISSIONER, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, *et al.*

Civil Action No. 80-03183

No. 83-1427

RICHARD KRODEL

v.

ANDREW J. YOUNG, in his official capacity as ASSOCIATE COMMISSIONER, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, *et al.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES and MARGARET M. HECKLER, SECRETARY, in her official capacity, *Appellants*

Appeals from the United States District Court for the District of Columbia.

[United States Court of Appeals for the District of Columbia Circuit, Filed Nov 20 1984
George A. Fisher, Clerk]

Before: WRIGHT and WALD, Circuit Judges, and MACKINNON, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: November 20, 1984

Opinion for the Court filed by Circuit Judge Wald.

APPENDIX E

Civil Service Commission

REGULATIONS

PART 771—AGENCY GRIEVANCE SYSTEM
5 C.F.R. § 771.108 (1977)

§ 771.108 Grievance coverage.

(a) Except as provided in paragraphs (b) and (c) of this section, this subpart applies to any matter of concern or dissatisfaction to an employee which is subject to the control of agency management or any matter in which an employee alleges that coercion, reprisal, or retaliation has been practiced against him or her.

(b) This subpart does not apply to:

(1) A matter which is subject to final administrative review outside the agency under law or the regulations of the Commission;

(2) The content of published agency policy;

(3) Nonselection for promotion from a group of properly ranked and certified candidates;

(4) A grievance covered by procedures established by an agreement negotiated under section 11 of the Executive Order 11491, as amended;

(5) An action terminating a temporary promotion within a maximum period of 2 years and returning the employee to the position from which he was temporarily promoted or reassigning or demoting him to a different position that is not at a lower grade or level than the position from which he was temporarily promoted;

(6) Nonadoption of a suggestion or disapproval of a quality salary increase, performance award, or other kind of honorary or discretionary award; or,

(7) A preliminary warning or notice of an action which, if effected, would be covered under the grievance system or excluded from coverage under subparagraph (1) of this paragraph.

(c) This subpart does not apply to a separation action. However, an agency may extend the coverage of its grievance system to any aspect of a separation action that is not subject to final administrative review outside the agency under law or the regulations of the Commission.

[39 FR 32542, Sept. 9, 1974, as amended at 41 FR 22550, June 4, 1976; 41 FR 30320, July 23, 1976; 41 FR 46866, Oct. 26, 1976]

APPENDIX F

Civil Service Commission

REGULATIONS

PART 713—EQUAL OPPORTUNITY
5 C.F.R. § 713.271(b) (1977)

§ 713.271 Remedial actions.

(a) . . . .

(b) *Remedial action involving an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more or the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by § 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the backpay liability may not accrue from a date earlier than 2 years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would

have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

Office - Supreme Court, U.S.
FILED
JUL 5 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1642

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD KRODEL, PETITIONER

v.

ANDREW J. YOUNG, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal employee's *Bivens* action challenging his failure to receive a promotion is precluded by the comprehensive remedial scheme established by Congress prior to the Civil Service Reform Act of 1978.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1642

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 748 F.2d 701. The memorandum of the district court (Pet. App. 25a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a-30a) was entered on November 20, 1984. On February 14, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to April 19, 1985, and the petition was filed on April 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a management analyst employed by the Social Security Administration. In 1976, petitioner, then 60 years old, applied to the agency's Bureau of Hearings and Appeals (BHA) for a promotion. Petitioner was on the final

list of three persons deemed best qualified for the position, but Mary Pronovost, then 39 years old, was selected from the list for the promotion. Claiming that he had been discriminated against on the basis of his age, petitioner unsuccessfully sought administrative relief. Pet. App. 2a-4a.

2. a. Petitioner then brought this suit in the United States District Court for the District of Columbia, alleging that the BHA's failure to promote him violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a, and the First and Fifth Amendments. He sought back pay and retroactive promotion under the ADEA and damages against his supervisors in their individual capacities for violation of his constitutional rights under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In support of his First Amendment claim, petitioner alleged that the BHA refused to promote him in retaliation for his criticisms of agency mismanagement. Pet. App. 5a.

The district court dismissed petitioner's First Amendment claim, reasoning that his criticisms of mismanagement were made within the scope of petitioner's duties as a management analyst (Pet. App. 26a-27a). The district court also concluded that, "to the extent that [petitioner] is claiming that his First Amendment rights were curtailed in retaliation for his filing discrimination claims, these are clearly covered by [the] ADEA," which provided the exclusive remedy for his complaint (*id.* at 27a).[1] Following a bench trial, the district court sustained petitioner's age discrimination claim and awarded him back pay, retroactive promotion, and attorney's fees (*id.* at 2a; see Pet. 12).

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[1]The district court dismissed petitioner's Fifth Amendment claim on the ground that it was "inextricably linked to his age discrimination claims" (Pet. App. 27a). Petitioner did not challenge this dismissal before the court of appeals (see *id.* at 3a) and does not do so before this Court.

b. On cross-appeals, the court of appeals affirmed in all respects (Pet. App. 1a-23a).[2] With respect to the *Bivens* claim, the court of appeals relied chiefly on *Bush* v. *Lucas*, 462 U.S. 367 (1983). In *Bush*, this Court held that a federal employee who, like petitioner, was governed by the remedial scheme in effect prior to enactment of the Civil Service Reform Act of 1978 (CSRA) could not bring an action for damages against his superiors for violation of his First Amendment rights. Petitioner conceded in the court of appeals that "[i]f *Bush* were the principal relevant case [the court of appeals] should be inclined to affirm the District Court * * * on the grounds that there was a 'comprehensive' scheme of civil service remedies both available and used" (Appellee/Cross-Appellant C.A. Br. 25; see Pet. App. 22a).[3] He sought to distinguish *Bush*, however, on the ground that his criticisms of government mismanagement advanced the public interest, while the speech at issue in *Bush* allegedly did not (Appellee/Cross-Appellant C.A. Br. 30; Pet. App. 22a).

The court of appeals did not accept this distinction, observing that the "argument was squarely rejected in *Bush* itself" (Pet. App. 22a; see 462 U.S. at 389-390). Finding *Bush* controlling, the court of appeals concluded that the remedial scheme established by Congress for federal employees in petitioner's position precluded the establishment of an implied cause of action for damages against their superiors under *Bivens* (Pet. App. 21a-23a).[4] The court of

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[2]The government has not sought review by this Court of the court of appeals' affirmance of the award to petitioner under the ADEA.

[3]Petitioner also admitted that, like the plaintiff in *Bush*, he "receive[d] the benefit of civil service remedies" (Appellee/Cross-Appellant C.A. Br. 26) and that "[t]he civil service mechanisms may well be a 'comprehensive' scheme for the protection of the personal interests of the employee wronged" (*id.* at 32).

[4]The court of appeals therefore found it unnecessary to reach the question whether petitioner's speech was constitutionally protected (Pet. App. 6a, 21a).

appeals also noted that petitioner "never raised his first amendment related complaints in any of the five separate grievances he filed at the agency level" and that "[h]is free speech claim is decidedly an afterthought and subsidiary to the age discrimination claim upon which he has prevailed" (*id.* at 22a).

ARGUMENT

Petitioner argues for the first time that he is entitled to pursue his damages action because, unlike the plaintiff in *Bush*, he could not have raised his First Amendment claim through the administrative grievance procedure. He not only failed to raise this argument below, but affirmatively disavowed it (see page 3 & note 3, *supra*). Under these circumstances, petitioner has not preserved his argument for review by this Court. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. The Court has recently declined to review claims similar to petitioner's in *Pinar* v. *Dole*, No. 84-1167 (Apr. 15, 1985), and *Cazalas* v. *United States Department of Justice*, No. 84-56 (Feb. 19, 1985), and there is no reason for a different result here. Moreover, because the conduct at issue occurred prior to enactment of the CSRA in 1978, it is governed by provisions no longer in effect, which lack continuing importance. Review by this Court is plainly unwarranted.

In *Bush* v. *Lucas*, *supra*, the Court's refusal to create a *Bivens*-type remedy for federal employees whose First Amendment rights have been violated by their superiors was grounded in the remedial scheme established by statute: "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy

considerations, should [not] be augmented by the creation of a new judicial remedy" (462 U.S. at 388). The Court reached this conclusion even though "Congress has provided a less than complete remedy for the wrong" (*id.* at 373). Thus, contrary to petitioner's contention (Pet. 7-13), *Bush* does not rest on the presence of a statutory remedy equivalent to an implied right of action for damages. Rather, the Court left to Congress the difficult balancing required "to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service" (462 U.S. at 389), regardless of the precise contours of the remedy actually provided.[5]

Moreover, petitioner was not left without remedies for the agency's failure to promote him. He prevailed in his age discrimination claim and was awarded his promotion retroactively, receiving back pay and attorney's fees. The Constitution hardly requires that his "afterthought" (Pet. App. 22a) of seeking additional damages for "anxiety" and the like (Pet. 13 n.6) be successful.[6] In addition, the comprehensive remedial scheme protecting federal civil servants from arbitrary action by their superiors provided petitioner with an informal mechanism for pursuing any complaints, including those regarding First Amendment rights, that he

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[5]The court of appeals' decision is not contrary to *Davis* v. *Passman*, 442 U.S. 228 (1979). The Court concluded there that Title VII of the Civil Rights Act of 1964 did not evince a congressional intent "to foreclose alternative remedies" such as an implied action for damages under the Fifth Amendment (442 U.S. at 247). *Davis*, which the Court distinguished in *Bush* (462 U.S. at 376-377), did not address the preclusive effect of the pre-CSRA remedial scheme applicable to civil servants such as petitioner; *Bush* did.

[6]Petitioner's position is similar to that of the employee in *Bush*, who had already obtained retroactive reinstatement and back pay (462 U.S. at 386 n.29) and sought to recover under the First Amendment for "emotional and dignitary harms" (*id.* at 372 n.9).

had concerning his failure to obtain a promotion. See U.S. Civil Service Commission, *Federal Personnel Manual,* ch. 335, §§ 5-2(g) and (h), 5-3 (1975).[7]

Several courts of appeals, consistently with the decision below, have refused to recognize implied rights of action by federal employees to recover damages for alleged wrongs in connection with their employment. See *Weatherford* v. *Dole*, No. 84-1252 (10th Cir. June 6, 1985); *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, No. 84-1167 (Apr. 15, 1985); *Hallock* v. *Moses*, 731 F.2d 754 (11th Cir. 1984); *Braun* v. *United States*, 707 F.2d 922 (6th Cir. 1983); *Broadway* v. *Block*, 694 F.2d 979 (5th Cir. 1982). Contrary to petitioner's contention (Pet. 13-17), there is no conflict requiring resolution by this Court. In *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984), the court of appeals did not decide "which, if any," of the plaintiff's allegations "survive the holding in *Bush*" (*id.* at 1415 n.21); in any event, the case presents at most an intra-circuit disagreement that should be resolved by the court of appeals, not by this Court.[8] See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). *Egger* v. *Phillips*, 710 F.2d 292 (7th Cir. 1983) (en banc), cert. denied,

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[7]Even if petitioner could pursue an implied damages remedy, the district court correctly concluded that petitioner's comments on the functioning of his employing agency—made in the course of his employment as a management analyst—did not constitutionalize the agency's failure to grant him a promotion. See *Connick* v. *Myers*, 461 U.S. 138 (1983); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). At bottom, petitioner's complaint is that his work product was not being evaluated properly, not that his freedom of speech was impaired. He has failed to carry his burden of demonstrating that his First Amendment rights were implicated by the agency's personnel decisions. See generally *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977).

[8]Had petitioner presented the theory on which he now relies to the court of appeals, that court would have had the opportunity to assess the relevance of its holding in *Bartel* to this case.

No. 83-5319 (Oct. 17, 1983), and *Sonntag* v. *Dooley*, 650 F.2d 904 (7th Cir. 1981), were decided prior to this Court's decision in *Bush* v. *Lucas*, and, insofar as they held that *Bivens* actions by federal employees were not precluded, they can no longer be regarded as authoritative.[9] Finally, because new protections for "whistleblowers" have been provided by Congress in the CSRA (see 5 U.S.C. 1206(a)-(c)), petitioner's claims, which arose prior to enactment of the CSRA, do not provide a suitable vehicle for determining the preclusive effect of the provisions now in force.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]See *Francisco* v. *Schmidt*, 575 F. Supp. 1200, 1203 (D. Wis. 1983). The court of appeals in *Egger* "reject[ed]" (710 F.2d at 298) the Fifth Circuit's decision in *Bush*, finding it "of questionable viability" (*id.* at 298 n.5). This Court later affirmed in *Bush*. More recently, the Seventh Circuit has refused to find an implied cause of action under the CSRA for a federal employee seeking to challenge the denial of a promotion. *Schrachta* v. *Curtis*, 752 F.2d 1257 (1985).